

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF MASSACHUSETTS

TRANS-SPEC TRUCK SERVICE INC., )  
Plaintiff, )  
-V- ) CIVIL DOCKET NO.  
CATERPILLAR INC., ) 04-11836-RCL  
Defendant. )

MOTION HEARING  
BEFORE THE HONORABLE JOYCE LONDON ALEXANDER  
UNITED STATES MAGISTRATE JUDGE

May 31, 2006

Boston, Massachusetts

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**APEX Reporting**  
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1 looked for exactly the unequivocal statement that you have  
2 just suggested and I received in response a statement saying  
3 that whether we were going forward or not depended on what  
4 the Court did with this emergency motion. I had to go to  
5 Peoria. I had to get a flight there to prepare the witness  
6 and to have the witness' documents available. I couldn't  
7 wait. These depositions were not tentatively scheduled,  
8 they had been noticed for specific dates that were agreed  
9 upon. And all I wanted was an unequivocal statement, one  
10 way or the other, are we going forward and they would not  
11 give it to me.

12 THE COURT: It seems to the Court that the two  
13 parties that counsel have or for counsel have more additions  
14 than the parties themselves.

15 What's the next issue, the motion for a summary  
16 judgement. You may be heard.

17 MR. GRUNERT: Your Honor, there was only one claim  
18 remaining and that's the negligence claim. And there are  
19 two separate grounds why that claim fails as a matter of  
20 law.

21 One ground disposes of the entire claim.

22 The second ground would leave a small amount of  
23 that claim pending, so the second ground is in the nature of  
24 a motion for partial summary judgement. The document -- and  
25 by the way, when I think of it, attached to my motion for

1 summary judgement are the warranties that Caterpillar gave.  
2 These are the warranties, and I attached the testimony from  
3 Mr. Howard saying that he received them. Those are the very  
4 warranties you were told on the motion to amend that the  
5 plaintiff didn't have until recently, by the way.

6 So the warranty that was given contains in bold  
7 faced print, capitalized letters, an exclusion that says  
8 that Caterpillar is not liable for any negligence in  
9 connection with these engines. That exclusion, under  
10 General Laws Chapter 220110, is conspicuous as a matter of  
11 law and is enforceable. And Massachusetts law could not be  
12 clearer that exclusions of negligence liability, at least  
13 between businessmen, are not only enforceable but they're  
14 favored. The Sharon case, Sharon v. City of Newton says  
15 they're favored because the law encourages the consensual  
16 allocation of risk between business people.

17 There's no dispute that that document is the  
18 warranty. There's no dispute that it was received. The  
19 legal effect of that language is clear. Under the Sharon v.  
20 Newton case, once that exclusion has been presented to you,  
21 the burden is on the plaintiff to come forward with specific  
22 evidence to show you that there is some reason why that  
23 release should not be given effect. I have gone through, at  
24 considerable length in my required brief, the various  
25 grounds that Trans-Spec has advanced. But I think I need to

1 say --

2 THE COURT: How do you respond to Trans-Spec's  
3 asseveration that a product has an apparent defect the buyer  
4 receives less than what the contract calls for.

5 MR. GRUNERT: The --

6 THE COURT: And therefore, the remedy fails of its  
7 specific purpose, of its essential purpose?

8 MR. GRUNERT: The section of the uniform  
9 commercial code, I think it's 20219. I could be wrong, it  
10 might be 2207, but the section of the uniform commercial  
11 code that pertains to failure of the essential purpose says  
12 that if a particular provision in a contract, if a  
13 limitation of remedies provision fails of its essential  
14 purpose, then other UCC remedies are available. Negligence  
15 is not a UCC remedy. There are no UCC remedies in this case  
16 because that claim is barred by the statute of limitations.  
17 So the failure of essential purpose, and I cited the case  
18 authority to you your Honor, the Canal Electric v.  
19 Westinghouse case is SJC decision that's right on point.  
20 There's also a decision out of the Ninth Circuit, Tokyo  
21 Marine v. McDonnell Douglas, I believe, it's again cited in  
22 my brief, where there's exactly this issue. There was a  
23 negligence claim and the defense was there's an exclusion  
24 about negligence claims and the plaintiff said, well the  
25 contract failed of its essential purpose. And that, like

1 this one, was a case where the warranty claims were barred  
2 by the statute of limitations. The Ninth Circuit says, no,  
3 no, no, no. Failure of essential purposes means you have  
4 UCC remedies. Your UCC remedies failed under the statute of  
5 limitations. You've got no -- that failure of essential  
6 purpose has no effect on an exclusion of negligence.

7 THE COURT: What about the economic loss doctrine  
8 being an all or nothing doctrine?

9 MR. GRUNERT: Again, that's just not the law. And  
10 I think on that subject, the most illustrative case is  
11 probably the Icelandic Coast Guard v. United Technologies  
12 case that I cited to you. Although, there's another case  
13 that I didn't cite to you, but I'd like to give you the cite  
14 now, it's Northern States Power Company v. International  
15 Telephone and Telegraph. It's at 550 F.Supp. 108 out of the  
16 District of Minnesota, which is also illustrative.

17 What these cases show and really, the Icelandic  
18 Coast Guard case is very good, because what happened in that  
19 case is the defendant had sold a helicopter to the Coast  
20 Guard. The helicopter crashed as a result of a product  
21 defect. And as a result of the crash, the crew members were  
22 killed, and the Coast Guard had to expend a lot of money on  
23 finding and retrieving their bodies. The Coast Guard also  
24 had to expend a lot of money finding the wreckage of the  
25 helicopter, with lost use of the helicopter, had to replace

1 the helicopter. And so, the Coast Guard sued United  
2 Technologies and United Technologies said, well your claim  
3 is barred by the economic loss doctrine.

4 And what the District Court in Connecticut said  
5 is, well you've got various kinds of losses here. To the  
6 extent that this crash caused injury to the crew members,  
7 that's an injury to persons or other property. And so, you,  
8 the Coast Guard can recover what you expended in finding and  
9 retrieving the crew members bodies.

10 As to the other categories of damages, the expense  
11 of finding the wreckage of the helicopter, the lost time,  
12 lost use of the helicopter, the cost of replacing the  
13 helicopter, those are all economic losses caused just by a  
14 defect in the product itself. Those you cannot recover.

15 So it says, summary judgement, as to the claims  
16 for those elements. No summary judgement for the claims for  
17 expenses searching for the crew members body. And if you  
18 review the Jeldwin case, if you review the other cases that  
19 I cited to you, you will see that that consistently is how  
20 the economic loss doctrine is applied.

21 The economic loss doctrine permits recovery of  
22 damages proximately caused by damage to other property.  
23 That is to say, property other than the product itself, or  
24 to person. It bars elements of damage that are attributable  
25 just to the defect in the product itself, to the loss of use

1 of the product through reduction in value. It's not an all  
2 or nothing matter in that case that Trans-Spec cites for  
3 that proposition doesn't stand for it. I talked to you  
4 about that in the brief. I don't think I need to recount it  
5 here, but that that statement was just a vague passing  
6 reference and a general history and it was followed by a  
7 number of citations to other authority, and if you read the  
8 other authority, you see that it says exactly what I just  
9 explained to you.

10 The economic loss doctrine requires  
11 differentiation between different types of damages. And the  
12 reason it does that is that if there are tort type damages  
13 that have been caused, the courts don't want to deny  
14 recovery but the problem of tort law swallowing up contract  
15 law remains. And so, the courts are very tough in saying  
16 that you cannot recover economic losses, economic type  
17 damages unless they are caused by damage to other property,  
18 not to the product itself.

19 THE COURT: Thank you.

20 MR. GRUNERT: Thank you, your Honor.

21 THE COURT: Trans-Spec, talk to the Court about  
22 the warning disclaimer not being enforceable because of its  
23 failure of its essential purpose.

24 MR. SAMITO: Well your Honor, I think Andover Air  
25 case is very instructive, in that Judge Zobel -- the

1 plaintiff, Andover -- if Andover proves that the warranty  
2 failed in its essential purpose, the exclusion of other  
3 damages becomes inoperative and Andover may seek  
4 consequential and incidental damages as allowed by the code.

5 THE COURT: But Caterpillar has said that  
6 negligence is not a UCC remedy and therefore, you can't even  
7 invoke that.

8 MR. SAMITO: But where the warranty fails of its  
9 essential purpose, your Honor, all bets are off. You can't  
10 just claim negligence, have everything else fall to the  
11 wayside and allow the breaching party to hold onto that  
12 disclaimer that benefits it. They're not getting the  
13 benefit. There's a difference, and there's other cases. I  
14 mean, the Hadar case from the Southern District of New York  
15 bears on this. In other cases that are cited --

16 THE COURT: But Caterpillar says that it doesn't  
17 fail -- in Court, the Court -- if the Court is wrong, did  
18 you not say that Caterpillar -- did Caterpillar not say that  
19 it doesn't fail of its essential purpose, is the Court  
20 correct?

21 MR. GRUNERT: I don't concede that --

22 THE COURT: Negligence is not a UCC remedy.  
23 That's what Trans-Spec is invoking when it says that it  
24 fails of its essential purpose?

25 MR. GRUNERT: I don't believe --



1 THE COURT: That the remedy fails?

2 MR. GRUNERT: I don't believe that --

3 THE COURT: Okay.

4 MR. GRUNERT: For purposes of --

5 THE COURT: Let me ask you and then have you  
6 respond. Let me ask Caterpillar the following question:  
7 Trans-Spec says that the disclaimer is unenforceable because  
8 it fails of its essential purpose. What do you say to that?

9 MR. GRUNERT: I say number one, that the -- what  
10 Trans-Spec claims failed of its essential purpose is the  
11 warranty that Caterpillar --

12 THE COURT: So you're saying they're saying the  
13 warranty failed of its specific purpose?

14 MR. GRUNERT: That's right.

15 THE COURT: That has nothing to do with this  
16 negligence claim.

17 MR. GRUNERT: That's correct. And if there had  
18 been a timely action brought to breach of warranty and if  
19 Trans-Spec --

20 THE COURT: We're dealing with the negligence.

21 MR. GRUNERT: Right, right.

22 THE COURT: Stop saying anything about the  
23 warranty. They're saying this disclaimer is unenforceable  
24 because it fails of its essential purpose. You say what  
25 again, and don't bring in the warranty?

1 MR. GRUNERT: The essential purpose of the  
2 disclaimer is obviously to disclaim liability for  
3 negligence. The argument that the warranty failed of its  
4 essential purpose as a matter of law means only that if that  
5 were found to be true, they would have other UCC remedies  
6 available to them. In other words, the limitation to a  
7 repair or replacement of defective parts would fall out of  
8 the case and Trans-Spec could sue for contract damages. The  
9 warranty claim -- all contract damages are barred by the  
10 statute of limitations.

11 THE COURT: But this is negligence.

12 MR. GRUNERT: That's right. Negligence is not a  
13 UCC remedy. So the failure of essential purpose law is  
14 simply irrelevant to this motion. And I cited --

15 THE COURT: That's what I wanted to hear you say.  
16 Thank you.

17 MR. SAMITO: Well your Honor, with all due respect  
18 here, Caterpillar, the cases that they cite involve  
19 situations including the Canal case, where the defendant  
20 tried to perform under the contract. Here, Caterpillar  
21 breached the contract, breached the warranty in 2001,  
22 breached it again in 2003 all together, and that's the  
23 difference.

24 It's one thing for the Court to look at a  
25 situation where Caterpillar was performing under the

1 warranty and then it may be a different story in terms of  
2 the exclusion of negligence, but that's not what happened  
3 here. And the cases that Caterpillar cites don't apply for  
4 that reason.

5 This is a situation where Caterpillar left  
6 Trans-Spec holding an open bag. Said we're not going to  
7 honor any other provision in these two warranty documents  
8 except for the disclaimer of negligence. That, we're going  
9 to cite that. We'll honor that because it benefits us. And  
10 that's the situation.

11 Time and again, the cases cited from Boston  
12 Helicopter to Hadar, the rejection of negligence  
13 disclaimers, Somerset Savings, Omni Flying, Andover, again  
14 and again said, that you can't have disclaimer of negligence  
15 where it's unconscionable or where it failed of its  
16 essential purpose. It's integrated into a document that  
17 completely fails. The Court will enforce that one  
18 provision. And again, the Andover Air case provides  
19 excellent guidance on that point. Judge Zobel talks about  
20 that unconscionability of the limited remedy and where it  
21 fails of its essential purpose.

22 THE COURT: So that Caterpillar's whole issue  
23 about the code is really irrelevant?

24 MR. SAMITO: Yes, your Honor.

25 THE COURT: Okay. Let me hear you on the economic

1 loss.

2 MR. SAMITO: Again, your Honor, the cases that  
3 Caterpillar cites involve situations where the loss is  
4 purely economic. If you look at the Binding Berish case, I  
5 remember from the last hearing that your Honor knows the  
6 Berish case quite well, referred to it as well as other  
7 cases that are cited here. The Massachusetts Supreme  
8 Judicial Court, not Connecticut, we'll dealing with  
9 Massachusetts law, Berish is binding. The SJC in Berish  
10 said, where you have damage, both to the actual property but  
11 then to elements outside of the property, the economic loss  
12 doctrine doesn't apply. The Damon court, in 1998, does cite  
13 three prior Wisconsin cases and then it comes down with its  
14 statement, the economic loss doctrine does not bar  
15 commercial purchasers claims based on personal injury or  
16 damage to property other than the product, or economic loss  
17 claims that are alleged in combination with non-economic  
18 losses.

19 Now what Caterpillar does here, is it files a  
20 motion for summary judgement, complains throughout that  
21 Trans-Spec doesn't provide adequate proof of the damages.  
22 Doesn't complete its Rule 30(b)(6) deposition of Trans-Spec,  
23 and then it says, well there's not enough proof in the  
24 record and the proof that is there is not credible. And  
25 issues of credibility aren't for the Court to decide at the

1 summary of judgement stage, they're for the jury to decide.

2 And the issues in terms of whether the damage was  
3 economic or not economic going forward, by Caterpillar's own  
4 notion, they concede that the damage to the truck's  
5 clutches, the drive trains, the transmissions, damage to  
6 property of Trans-Spec in terms of the actual physical  
7 ground, the oil leaks on other peoples, other customer's  
8 property. That's all issues that show the economic loss  
9 doctrine doesn't apply here. It's by the Binding Berish  
10 case. There was damage to property outside of the engines  
11 themselves. And if the damage was just confined to the  
12 engines, that may be one story, but that isn't what was the  
13 case here in the deposition testimony. We have affidavits  
14 that point to the fact that there was damage to other  
15 property.

16 The fact that Caterpillar doesn't like that  
17 evidence and doesn't like the affidavits is not neither here  
18 nor there. I note that Caterpillar moves to strike four out  
19 of five documents. Four of the documents are documents that  
20 they actually append to their own motion for summary  
21 judgement. And now they're saying, oh we should exclude  
22 that. They want to exclude any evidence that there was  
23 damage to other property.

24 There's also issues with misrepresentations.  
25 Negligent breach of contract, those are two issues of

1 negligence that are encompassed in the negligence count that  
2 are carved out of the economic loss doctrine, and I need not  
3 spend the time of the Court, indeed the cases are cited in  
4 our opposition papers. But negligent misrepresentation, and  
5 we (unintelligible) the history with documents, with  
6 Caterpillar testimony, with affidavits, and the negligent  
7 breach of the warranty documents -- the negligent breach of  
8 contract --

9 THE COURT: One of the arguments you make is that  
10 the Court twice rejected Caterpillar's contention, but the  
11 Court did not because it said at that stage of the  
12 proceedings it was not prepared to render a decision on that  
13 issue. But the Court didn't reject Caterpillar's assertions  
14 outright. And so now Caterpillar brings them and you're  
15 saying, based on the cases that have been previously cited,  
16 that the Court should now reject Caterpillar's assertions  
17 outright?

18 MR. SAMITO: I don't remember if I cited all the  
19 cases, but the Berish v. Bernstein in 2002, the Aldridge v.  
20 ADD, which is SJC 2002, several other cases that are given  
21 are in Caterpillar's own memorandum on page 6 are all  
22 reasons why the Court should deny as to the economic loss  
23 argument because there was damage to property outside of the  
24 engines themselves. And as a result of that, the negligence  
25 claim on that ground goes forward.

1 THE COURT: Counsel, what about the injury or  
2 damage to other than the design or manufacture.

3 MR. GRUNERT: I told you when I started that, as  
4 far as the economic loss doctrine is concerned, it's a  
5 motion for partial summary judgement.

6 I have seen records indicating that, at least,  
7 sometimes when a flywheel housing failed there would be  
8 damage to a clutch or a starter motor, and those would have  
9 had to have been replaced. The cost of replacing those  
10 sorts of incidental parts is a tiny fraction of the damages  
11 sought in this case. But I was explicit that that extent,  
12 to the extent that recovery is sought for damage, the cost  
13 of replacing damaged truck parts, that I don't seek summary  
14 judgement under the economic loss doctrine, although I do  
15 under the contractual exclusion.

16 Beyond that, I just have two comments. Number  
17 one, you will not find anything in my brief that talks about  
18 credibility. I'll be perfectly content if your Honor simply  
19 looks at the evidence attached both to my motion and to the  
20 opposition, and if you'll see what the evidence shows as  
21 distinct from what the attorneys say in their brief.

22 And the second thing is that the Berish case has  
23 nothing to do with this issue. The Berish case does not  
24 address the subject of whether when there are both economic  
25 losses and non-economic losses, whether the plaintiff is

1 limited to recovering only losses that are proximately  
2 caused by damage to other property, and that is the issue  
3 that's addressed here and that is the issue that is  
4 addressed in all of the cases that I've cited you on the  
5 economic loss doctrine, your Honor.

6 THE COURT: Well the Berish case says that the  
7 economic loss doctrine precludes recovery for negligence in  
8 the design or manufacturer of the product if the negligence  
9 causes no injury other than to the product itself. That's  
10 what it says.

11 MR. GRUNERT: Correct.

12 THE COURT: And so that if portions of the  
13 decision sort of argues in favor of Trans-Spec, do you  
14 disagree with that?

15 MR. GRUNERT: Well yes. I mean, as you know --

16 THE COURT: I should've known that.

17 MR. GRUNERT: As you know, courts decide the  
18 issues that are presented to them. Nothing in the Berish  
19 case indicates that the Court was asked to decide whether,  
20 in the presence both of damage to both other property and  
21 what would typically be just economic loss, damage to the  
22 product itself, they weren't asked to decide whether you can  
23 collect for the damage caused to other property but not for  
24 the product itself. That issue wasn't before them, it is  
25 not addressed.



1           What that Court basically said is, well the  
2 product in this instance is the whole house, it's not just  
3 the windows. And you know, we accept that. That, I guess,  
4 is the law of Massachusetts. But it didn't address the  
5 issue that's before you now and why would they go out on a  
6 limb to address that issue, but the issue has been  
7 addressed, it was addressed in the Jeldwin case and it was  
8 addressed in the other cases that I've cited to you. And I  
9 suggest to you that those cases make perfect analytical  
10 sense.

11           And Trans-Spec has not cited you to any authority  
12 to the contrary if you actually read the cases that they've  
13 cited you. So that's really all I have to say about the  
14 Berish case. You've characterized that when we were before  
15 you once before as a, I'm not sure of the words you used,  
16 but it indicated that it is sort of a difficult case to  
17 understand how they got to where they were going.

18           THE COURT: But they got there.

19           MR. GRUNERT: They got there. They got to say  
20 what the law is, but the issue that is before you is not one  
21 that they addressed or decided. Thank you, your Honor.

22           THE COURT: Now before you leave and I take all of  
23 this under advisement to send to you, when is the deposition  
24 going to take place and when are these documents going to be  
25 produced? Is it sometime in June?